United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

To be argued by
ROBERT S. HAMMER

75-2071

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P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA ex rel.
AMERICO LLUVERAS,

Petitioner-Appellee,

-against-

HON. J. EDWIN LAVALLEE, Superintendent,
Clinton Correctional Facility, etc.,

Respondent-Appellant.

BRIEF FOR APPELLANT

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UNITED STATES OF AMERICA ex rel. AMERICO LLUVERAS,

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Respondent-Appellant.

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BRIEF FOR APPELLANT

Questions Presented

1. Whether the District Court erred in admitting incompetent and unprobative medical testimony?

2. Whether the District Court's finding that petitioner-appellee's confession was involuntary was clearly erroneous?

Statement of the Case

This is an appeal (173a)* from an order of the District Court for the Southern District of New York (Hon.

*Numbers in parentheses followed by "a" refer to pages of the Appendix.

Edmund L. Palmieri, District Judge, entered March 21, 1975, granting petitioner's application for a writ of habeas corpus after an evidentiary hearing (171a-172a). By its terms, the order and judgment of the District Court was stayed during the pendency and determination of this appeal (172a).

Petitioner is currently on parole from three concurrent prison sentences of ten to thirty years imposed on him by the former Court of General Sessions of New York County (now merged into the Supreme Court), Hon. Irwin D. Davidson on March 1, 1961. A jury had found him guilty of three counts of robbery, first degree (N.Y. Penal Law of 1909 § 2124) as charged in Indictment No. 4546/1960. The conviction was affirmed, 19 A D 2d 525 (1st Dept. 1963), and leave to appeal to the New York Court of Appeals pursuant to former N.Y. Code of Crim. Pro. § 520 was denied on July 9, 1963 (Fuld, J.).

Following the decisions of the Supreme Court of the United States in Jackson v. Denno, 378 U.S. 32 (1964) and of the New York Court of Appeals in People v. Huntley, 15 N Y 2d 72 (1965), petitioner instituted a coram nobis proceeding challenging the voluntariness of certain confessions and admissions introduced against him at trial. The "Huntley" hearing was held before Mr. Justice Davidson beginning May 6, 1966, who denied the petition on June 22, 1966. The Appellate

Division affirmed, 31 A D 2d 892 (1st Dept. 1969), and leave to appeal to the New York Court of Appeals was denied on March 20, 1969 (Fuld, Ch. J.). Certiorari was denied sub nom. Lluveras v. New York, 396 U.S. 457 (1969).

As he had alleged in the State courts, petitioner claimed in his pro se application for habeas corpus that his confession had been the product of police brutality and his discomfort from heroin withdrawal (22a).*

The petition was dismissed by the District Court (33a-34a). However this Court remanded for an evidentiary hearing into the voluntariness of petitioner's confession (37a).

The Hearing

At the outset of the hearing, the following facts were stipulated to by counsel for both sides:

> "1. On May 5, 1960 between 4:00 and 5:00 P.M., the petitioner, Americo Lluveras, surrendered himself to the police and was taken to the 24th Precinct station.
>
> "2. Lluveras was held in confinement throughout the night at the police station (excepting a brief period when he was taken by police to be exhibited to a witness.) (155a)

* perjured testimony by police officers (15a-16a) denial of counsel (19a) and undue delay in arraignment (18a) were also alleged are not at issue herein.

"3. Lluveras was questioned intermittently by the police throughout the night. The questioning was continued in the morning by Assistant District Attorney Sandler, who, at about 8:00 A.M. took a formally transcribed Q and A over 70 pages long which lasted for about one and one half hours.

"4. At no time from the moment of his confinement between 4:00 and 5:00 P.M. through the end of the Q and A at 9:30 A.M. the next morning did the Lluveras have any opportunity to sleep.

"5. The police did not at any time during the night advise Lluveras of any right to remain silent, or to have counsel or warn him that his statements would be used against him. The Assistant District Attorney did not advise Lluveras of any rights during his preliminary questioning. At the start of the formal Q & A at 8:00 A.M. he advised Lluveras of his right to remain silent, which was the first and only warning Lluveras received as to any of his rights.

"6. Lluveras at the time was a narcotics addict. This fact was known to the police. He was described in an alarm issued shortly prior to his arrest as a heavy narcotics user. (156a)

"7. From the time of his confinement throughout the night and the next morning, Lluveras received no drugs or medications. (156a-157a)

"8. Lluveras's confession was introduced into evidence against him at his trial.

"9. The transcription of the Q & A (71 pages in length) has been lost, either by the District Attorney's office or the courts." (157a)

Petitioner limited his proof at the hearing to the effect his withdrawal from heroin May 6-7, 1960 had upon the voluntariness of his statements to the police and to the District Attorney. Counsel took the position that the claims of police brutality raised by petitioner in the State "Huntley

Hearing" which had been resolved against him had been "judicially, laid to rest" (40a-41a).

Petitioner testified at length as to his early childhood and his development of a $25 to $40 per day "mainlining" heroin habit (71a-76a). In 1956 when he was 13 years old, he was arrested for possession of 2 1/2 ounces of drugs (76a). After detoxification and five months of hospitalization petitioner was released (77a-78a). In August, 1956 he was arrested for another crime; pleaded guilty and was placed on probation. However, two months later his probation was revoked for consorting with known criminals and was sent to prison (78a). Upon release from prison on parole in June 1959 he immediately resumed drug use. He was arrested for parole violation in November 1959 and held for one month (79a-80a).

At the time of his arrest, petitioner had, once again, developed a $25-40 per day heroin habit (81a-83a).

On May 4, 1960 petitioner learned that the police were looking for him when he heard them talking to his mother as he was about to enter her apartment (83-84a). He left the premises and went to a friend's apartment spending the night taking drugs. After breakfast the following morning, he telephoned his mother and upon learning that the police were still there spoke to an officer and told him that he would go to the police station at 126th Street between Old Broadway and Amsterdam

Avenue (84a-85a). Instead he spent the day taking drugs with his friends (85a-86a). Later that day, he called the police and told them that he was going home to his mother's apartment. After having cake and milk he changed his clothes and accompanied the police officers to the station at about 4:00 p.m. (86a-87a). His last injection of heroin had been at about 12:00 noon that day (87a).

Arriving at the station house at about 4:30 p.m., petitioner stated that he began to experience withdrawal symptoms around 6:00 or 6:30 (87a-88a).

Petitioner described his symptoms as having worsened as the night went on, during which time petitioner was questioned intermittently (89a-90a). Petitioner stated that he did not sleep; that he felt extremely sick; that he confessed to having committed numerous crimes, including offenses allegedly having occurred while he was in prison. That his sole interest was to "get a fix," (91a-92a).

At about 8:00 a.m. a formal, transcribed "Q and A" was taken by Assistant District Attorney Leonard Sandler (now Judge of the New York Court of Claims, assigned to the Supreme Court) (93a-94a). The interview lasted about two hours (95a). At the outset petitioner was advised that he need not make a statement but that if he did, it could be used against him (196a).

In support of his contention that his incriminating statements were the result of his withdrawal symptoms, petitioner presented the testimony of Milford Blackwell, M.D., a psychiatrist whose experience included treatment of drug addicts (45a-47a).

Dr. Blackwell took a detailed case history from him; examined his present mental state and conducted a psysical examination to determine prior drug use (48a).

On the basis of the foregoing, it was Dr. Blackwell's opinion that petitioner's confession was involuntary; induced by fatigue and the withdrawal symptoms (50a-52a).

Dr. Blackwell stated that he had relied upon the truthfulness of petitioner's statement (57a); that the severity of the withdrawal symptoms would be affected by the purity of the drug which he assumed to be fairly high because of the price petitioner stated he was paying (55a-56a). Dr. Blackwell also testified that he had not seen any medical records relating to petitioner's physical or mental condition at the time of his arrest (55a).

Character testimony was presented to the effect that petitioner's current reputation for veracity and reliability is extremely high (60a-70a; 125a-128a). However, one witness, Rafael Ferrer, Associate Dean of Student at Hunter College,

who had known petitioner as a young man, stated at the time petitioner was on drugs, he was "pretty shaky" and not to be trusted (62a-63a). On cross-examination petitioner, himself, agreed with Dean Ferrer's characterization of him during that period (103a).

Petitioner also testified on cross-examination that he had "hustled" in the streets to support his drug habit (i.e. gambled, mugged, stolen and peddled drugs) (104a). He claimed to be unaware of his rights to counsel (despite his earlier brushes with the law) when he was represented by assigned counsel (107a-109a); although at the time of his arrest he was carrying the business card of a lawyer who was representing him in a civil matter (109a). Although he said he confessed to crimes he did not commit, he resisted confessing to a homicide that he was questioned about (112a-114a). He said he told Assistant District Attorney Sandler he was sick but did not ask to be left alone (115a-116a).

The stenographic transcripts of petitioner's trial and the post-trial, Huntley hearing were admitted into evidence insofar as they pertain to the issues raised at the hearing (128a).*

Assistant District Attorney Sandler testified that he warned petitioner of his right against self-incrimination

*References thereto are indicated by numbers in parentheses preceded by "H" or "T".

(T 725, H 150); but that he confessed readily (H 159); that he never manifested any physical distress (H 172-173).

Detective McPartland who interroged him, recalled that the petitioner stated to the officer that he had "taken a shot" just before surrendering himself (H 194) and, although at no time while he was being questioned was the petitioner "visibly in agony as a result of withdrawal" (H 194), it did seem to McPartland as the evening later "wore on," that the petitioner was becoming "in need of another shot" (H 198).

The petitioner confessed to the robbery very early in the evening-somewhere around 9:30 or 10:00 p.m. (H 191). He didn't "just" confess for no reason at all, his confession was brought about by confrontation with his victims, "especially one woman that he severely beat on the head during a holdup of a card game. And after we showed him that we knew he did it; he readily admitted it" (H 230; H 190-1).

Detective Coyne, another police officer at the station, although he had had little experience with narcotic addicts (H 246), was able to state when petitioner's counsel asked him whether the defendant was "in withdrawal" (H 246): "Not too bad. He was all right. He was standing up. He was talking" (H 247). Asked whether the petitioner was in pain, he answered that he "wouldn't say so" (H 247). He couldn't answer whether the petitioner was perspiring, or whether his

petitioner was perspiring, or whether his pupils were dilated (H 247). He was certain, though, that the petitioner had never vomited (H 247).

The Decision Below

The District Court treated this case as one primarily involving issues of fact (164a), declining to suggest a precedent for future cases involving the effects of drug withdrawal (163a). However, in determining that the totality of the circumstances reflected an involuntary confession (169a), the court below gave credence to petitioner's testimony and that of his expert witness with respect to the effects of his drug addiction (165a-168a).

POINT I

THE ADMISSION OF PETITIONER'S EXPERT TESTIMONY WAS ERRONEOUS

The primary focus of petitioner's case at the evidentiary hearing was the submission of medical evidence as to the voluntariness of his confession, an area that was not covered at the Huntley Hearing, (H 176 - H 178). However such medical testimony that was offered by petitioner to buttress his claim was totally unreliable. It was based exclusively upon petitioner's own version of the events, years after they occurred. His witness, Dr. Blackwell did not even have the benefit of contemporaneous medical records.

Under such circumstances, this Court has recognized the lack of probative value to such evidence. United States ex rel. Kaye v. Zelker, 355 F. Supp. 1002, 1005-1006, 1008 (S.D.N.Y. 1972) affd. 474 F 2d 1336 (2d Cir.) cert. den. 414 U.S. 845 (1973); an a fortiori case, since Kaye's hospital records were available and were utilized.

Particularly in the area of the effects of any withdrawal symptoms, expert testimony must be viewed with great caution. Indeed, one expert has stated that in objective medical terms, the withdrawal syndrome "is about as severe as a bad case of the intestinal flu" and that the only evidence of withdrawal which he would accept would be "a statement of a physician who observed objective signs of withdrawal," United States ex rel. Collins v. Maroney, 287 F. Supp. 420, 423 (E.D. Pa. 1968). This is precisely the ground on which Mr. Justice Davidson, in an obiter dictum, indicated that he would exclude medical evidence at the Huntley Hearing - that petitioner had failed to provide an adequate foundation for such testimony, (H 176-178). Having been given the opportunity to present medical testimony in the District Court, it is clear that this evidence suffers from the same infirmity noted by Justice Davidson. Consequently, as requested at the hearing (21), Dr. Blackwell's testimony should have been stricken.

petitioner was able to resist alleged attempts to get him to confess to a homicide (112a-114a).

Whatever discomfort he may have been suffering as a result of withdrawal from heroin, the self-serving testimony that his will was thereby overcome was belied by the testimony offered at the Huntley Hearing pp 8-10, supra.

Those courts which have ruled on the matter recognize that no per se rule invalidates the confession of a drug addict going through withdrawal symptoms, Ortiz v. United States, 318 F. 2d 450, 453 (9th Cir. 1963); United States ex rel. Sadler v. Comm. of Pennsylvania, 306 F. Supp. 102, 104 (E.D. Pa. 1969), affd. 434 F. 2d 997 (3d Cir. 1970); United States v. Young, 355 F. Supp. 107, 109 (E.D. Pa. 1973); United States ex rel. Collins v. Maroney, 287 F. Supp. 420, 422-423 (E.D. Pa. 1968). See also United States ex rel. Fitzgerald v. LaVallee, 461 F. 2d 601, 602 (2d Cir.); cert. den. 409 U.S. 885 (1972). Thus the improper admission of "expert" testimony, POINT I herein, so essential to the petitioner's case, alone warrants a reversal.

Finally, we respectfully submit that even the District Court's partial acceptance of the credibility of petitioner's testimony (168a) was misplaced.

POINT II

THE DISTRICT COURT CLEARLY ERRED IN FINDING PETITIONER'S CONFESSION INVOLUNTARY

The District Court correctly stated the rule that the voluntariness of petitioner's confession must be judged by the totality of the circumstances (164a), Davis v. North Carolina, 384 U.S. 737, 740 (1966); Culombe v. Connecticut, 367 U.S. 588, 606 (1960); United States ex rel. Ward v. Mancusi, 414 F. 2d 87, 80 (2d Cir. 1969).* However we respectfully submit that it committed clear error in applying this doctrine.

It is undisputed that petitioner voluntarily accompanied the police to the station house (86a). He was aware of the usefulness of a lawyer, indeed, had an attorney's business card in his pocket, (109a) but did not seek legal help. He was not questioned constantly, but intermittently (111a). He stated that he felt ill but did not ask for a doctor; neither did he ask the Assistant District Attorney, who had advised him of his right to remain silent, to leave him alone, when the "Q and A" was being taken (115a-116a). Despite the alleged severity of his withdrawal symptoms

*The events leading up to this case occurred in 1960 prior to Escobedo v. Illinois, 378 U.S. 478 (1964) and Miranda v. Arizona, 384 U.S. 436 (1966) which are not retroactive, Johnson v. New Jersey, 384 U.S. 719 (1966).

Whatever petitioner's present reputation for veracity may be, the events in question relate to a period when petitioner was, by his own admission and by the testimony of one of his own character witnesses totally unreliable (103a, 63a). Indeed, particularly in civil proceedings character testimony regarding reputation after an event is generally held inadmissible, Richardson, Evidence §§ 151, 158 pp. 123, 128 (10th Ed. 1973); 29 Am. Jr. 2d Evidence § 348. Petitioner's character testimony should also have been stricken (63a).

Indeed, if there is any reliable determination as to petitioner's credibility at that time in his life it is that made by Mr. Justice Davidson after the Huntley Hearing who said:

> "Petitioner's testimony was replete with false and untrue statements and manufactured charges of brutality. I find that his testimony is entirely unworthy of belief, and is completely incredible." Affirmed in People v. Lluveras, supra, 31 A D 2d 892.

The evidentiary hearing was directed by this Court to be held prior to the ruling of the Supreme Court in LaVallee v. Delle Rose, 410 U.S. 690 (1973). In the light thereof, we submit that a hearing was in fact, unnecessary. Clearly, Justice Davidson applied the proper "totality of the circumstances" standard; the evidence adduced thereat

settled the issues at bar and should have been undisturbed, 28 USC § 2254(d); 410 U.S. at 695. Cf. U.S. ex rel. Oliver v. Vincent, 498 F 2d 340, 344 (2d Cir. 1974); U.S. ex rel. Williams v. LaVallee, 437 F 2d 1006, 1011 (2d Cir. 1973).

CONCLUSION

THE ORDER APPEALED FROM SHOULD BE REVERSED AND THE PETITION DISMISSED

Dated: New York, New York
July 3, 1975

Respectfully submitted,

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